

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2009-311-C - ORDER NO. 2010-542
AUGUST 12, 2010

IN RE: Genesis Telecommunications, LLC,)	ORDER DISMISSING
Complainant/Petitioner v. United Telephone)	COMPLAINT AND
of the Carolinas, LLC d/b/a CenturyLink)	GRANTING
(f/k/a Embarq), Defendant/Respondent.)	COUNTERCLAIM

I. INTRODUCTION

This proceeding arises from a dispute between Genesis Telecommunications, Inc. ("Genesis") and United Telephone Company of the Carolinas, LLC d/b/a CenturyLink ("CenturyLink") concerning whether the rates CenturyLink billed Genesis Telecommunications, LLC ("Genesis") for unbundled DS1 loop comply with the terms of the parties' interconnection agreement.¹ For five-and-a-half years Genesis ordered and paid for UNE DS1 loops from CenturyLink at the rate set forth in the parties' interconnection agreements. In August 2008, Genesis began disputing these rates, first because it alleged it was receiving xDSL loops instead of DS1 loops, and then because it stated the DS1 loops CenturyLink was providing were not DS1 loops as defined in the Agreement. In conjunction with filing these disputes, Genesis began withholding payments to CenturyLink for the DS1s. This dispute led to the Complaint filed by Genesis and the Counterclaim filed by CenturyLink that are the subject of this Docket.

¹ The parties entered into three separate interconnection agreements since December 2000. (Tr. 52-53) The most recent interconnection agreement, which was effective July 18, 2008, is the Interconnection Agreement between CenturyLink and Genesis (Adoption of the BullsEye Agreement), Exhibit ALG-1, Composite Hearing Exh. 1 which will be referred to herein as "Agreement").

Our decision involves a review of applicable South Carolina case law relating to the construction of contracts and a review of federal law and decisions relating to the provision of UNE DS1 loops. In addition, our decision involves a review of the evidentiary record encompassed in the transcript of the February 4, 2010, hearing and consideration of the parties' Post-Hearing Briefs.

For the reasons set forth below, the Commission finds that:

- 1) Genesis's Complaint is denied for failure to meet its burden of proof;
- 2) Genesis's Motion for Summary Judgment and Motion in Limine are denied because evidence is necessary to determine the intent of the parties;
- 3) The parties intended under the Agreement that DS1 loops be provided in accordance with federal law and FCC regulations, as well as applicable industry standards;
- 4) CenturyLink provided DS1 loops to Genesis in accordance with these laws, regulations and standards; and, therefore,
- 5) CenturyLink's Counterclaim is granted and Genesis is ordered to pay CenturyLink its contract rates for DS1 loops under the original terms of its Agreement.

II. PROCEDURAL BACKGROUND

This Docket originated as a result of a Complaint filed by Genesis in July 2009. CenturyLink submitted an Answer to the Complaint, as well as its Counterclaim. The hearing was scheduled for February 4, 2010, and a pre-file testimony letter was issued in August 2009, setting forth the time frames for pre-filing direct, rebuttal and surrebuttal

testimony in accordance with the Commission's procedural rules. On December 30, 2009, Genesis filed a request for extension of time to file its direct testimony (one day after the due date for filing direct testimony had passed). CenturyLink objected to the delay and the extension was denied. In accordance with the pre-file testimony letter, CenturyLink pre-filed the Direct Testimony of April L. Goodall and Richard J. Showers on January 12, 2010, and Surrebuttal testimony on January 26, 2010. Genesis pre-filed the Rebuttal Testimony of John Lawrence on January 19, 2010.

A hearing was held before the Commission on February 4, 2010. Jack Burge attended the hearing as a witness for CenturyLink and adopted the Direct and Surrebuttal Testimony of April L. Goodall. Richard J. Showers attended the hearing as a witness for CenturyLink and presented his Direct and Surrebuttal Testimony. Genesis presented the Rebuttal Testimony of John Lawrence. The transcript of the hearing was released on April 26, 2010. The Commission directed Post-hearing Briefs and Proposed Orders to be filed within 30 days of that date.

III. SUMMARY OF TESTIMONY

CenturyLink's witness, Jack Burge, adopting the pre-filed testimony of April L. Goodall (Tr. 17, 115), testified that there are two interconnection agreements that cover the time frames of Genesis's dispute with CenturyLink over DS1 rates. (Tr. 21). According to the testimony, these agreements contain identical terms related to the definition of and rates for DS1 loops. (Tr. 21). Mr. Burge testified that the parties could not resolve their dispute over the DS1 rates and the result was that Genesis filed a Complaint and CenturyLink filed a Counterclaim to obtain Commission resolution of

these issues, in accordance with the Agreement's Dispute Resolution provisions. (Tr. 20, 21-22). Mr. Burge testified regarding the course of the disputes and the differences in rates CenturyLink billed for DS1 loops under the Agreement and the amounts Genesis paid CenturyLink on the basis of these disputes. (Tr. 23-28). Mr. Burge's testimony also sets forth the definition of "DS1 loop" in the interconnection agreements, as well as the definition of "DS1 loop" in FCC Rule 51.319(a) (4), which is the basis for the definition in the Agreement. (Tr. 29).

Richard J. Showers filed testimony demonstrating that the DS1 loops CenturyLink has provided to Genesis fully comply with long-standing industry standards for DS1 loops, which are a fundamental component of the national telecommunications network. (Tr. 60). Mr. Showers' testimony also describes the FCC Order which was the basis for the definition of DS loop in FCC Rule 51.319, and thus the basis for the definition in the interconnection agreement.² (Tr. 63-64). Mr. Showers suggests that the word "megabytes" is used interchangeably with the word "megabits" in the Rule, since it is clear from the discussion in the TRO that the FCC recognizes that 1.544 Megabits per second is the industry standard for the speed of DS1 loops. (Tr. 71, 79). Mr. Showers also attaches relevant industry standards as exhibits to his testimony to provide further evidence of the 1.544 Megabit per second standard applicable to DS1s. (Composite Hearing Exh. 2). In addition, Mr. Showers' testimony shows that the DS1 loops CenturyLink provides to Genesis are the same as the loops CenturyLink provides within

² *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Service Offering Advanced Telecommunications Capability*, FCC Docket Nos. 01-338, 96-98 and 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("TRO") at ¶ 202, footnote 634.

its own network, to its own subscribers and to other carriers (Tr. 137), and that all other telecommunications carriers comply with these same standards in their provisioning of DS1 loops. (Tr. 67, 138).

John Lawrence provided Rebuttal Testimony on behalf of Genesis. According to Mr. Lawrence's Rebuttal Testimony, CenturyLink does not provide DS1 loops in accordance with the definition in the parties' interconnection agreement. (Tr. 89-90). Mr. Lawrence asserts that the speed of the DS1s CenturyLink provides is 1/8th of the speed required by the definition, although he does not explain how he arrived at this ratio. (Tr. 90). Mr. Lawrence also disagrees with CenturyLink's testimony regarding the various exchanges between the parties related to xDSL loops. (Tr. 90-91). In addition, Mr. Lawrence states that if CenturyLink terminates services to Genesis as a result of its failure to fully pay CenturyLink's bills for DS1 loops, Genesis's customers would be forced to find other providers for their services. (Tr. 92).

IV. MOTIONS

The parties presented three motions at the hearing, which the Commission deferred to the Final Order. First, counsel for Genesis moved for Summary Judgment in favor of Genesis on the grounds that the case presented only a legal issue concerning the interpretation of a contract and that the Agreement was unambiguous and must be resolved without consideration of any factual evidence. In addition, counsel for Genesis moved for a Motion in Limine to exclude any evidence outside the four corners of the Agreement. CenturyLink's counsel disagreed that the contract was clear on its face and

asserted that there were several factual issues that the Commission must determine to resolve the dispute.

CenturyLink's counsel also moved to dismiss Genesis's Complaint because Genesis failed to present any affirmative evidence in support of its Complaint and, therefore, failed to meet its burden of proof. CenturyLink argued that it had met its burden of proof as to its Counterclaim and that the Commission should proceed with a ruling on the Counterclaim alone.

A. Genesis's Motion for Summary Judgment and Motion in Limine

When the terms of a contract are clear and unambiguous, the general rule is that the Commission must look only within the four corners of the contract to determine its intent.³ Whether a contract is ambiguous is a question of law which must be decided by looking at the contract as a whole.⁴ When looking at the Agreement as a whole, it appears that there is an ambiguity in the meaning of the term "megabyte" in the definition of a DS1 loop.

First, the term "megabyte" is not defined. The contract states that when a term is not defined, the parties are to construe such terms "in accordance with their customary usage in the telecommunications industry as of the Effective Date of this Agreement." (Agreement, Part A, Section 1.1). However, the term "megabyte" is a technical term, more commonly used in the computer environment than the telecommunications environment. (Tr. 48-49, 68). In addition, there is no single standard for the meaning of a "byte" in relation to a "bit." (Tr. 68). Therefore there is no clear meaning to be

³ See, 30 S.C. Jur. Contracts § 30.

⁴ See, *Koon v. Fares*, 379 S.C. 150, 666 S.E. 2d 230 (2008).

ascertained solely from the common usage of the term within the telecommunications industry.⁵

Not only is the term “megabyte” not defined in the Agreement, nor can its meaning be clarified solely by resort to standard industry usage, but the remainder of the definition itself reflects some inconsistency in the use of the term. The second sentence of the definition refers to DS1 loops as “high-bit rate” subscriber line services, which implies that the speed at which DS1 service is to be provided is measured in bits. In addition, the FCC Order which is the basis for the definition of DS1 loop in the agreement references Megabits per second (Mbps) in its discussion of DS1 speed.⁶ (Tr. 63-64). Finally, Section 45.8.7 of Part E of the Agreement, establishing CenturyLink’s obligation to provide DS1 loops, refers to ANSI standards, which define DS1 speed using the industry standard 1.544 Megabits per second. (Tr. 61-62; Composite Hearing Exh. 2; Late-filed Hearing Exh. 6).

Because the meaning of the term “megabyte” as well as the meaning of the term “DS1 loop” is ambiguous when looking within the four corners of the interconnection agreement itself, the Commission may look to evidence outside the agreement to determine the parties’ intent regarding the provision of and billing for UNE DS1 loops.⁷ Therefore, Genesis’s Motion for Summary Judgment and Motion in Limine are denied.

⁵ See, definitions of “byte” and “Bps,” Newton’s Telecom Dictionary (18th ed. 2002 and 25th ed. 2009).

⁶ TRO, at ¶ 202, footnote 634, *supra*.

⁷ See, e.g., *Madden v. Bent Palm Investments*, 386 S.C. 459, 688 S.E. 2d 597 (Ct. App. 2010). The principles of South Carolina law relating to the construction of contracts typically require that any ambiguity in a contract’s terms is to be construed against the drafter. No specific evidence was presented regarding who drafted the CenturyLink/BullEye agreement adopted by Genesis. Regardless, the general principle is not applicable here, where the Agreement was clearly intended to conform to FCC regulations and where the questionable term was drafted by the FCC.

B. CenturyLink's Motion to Dismiss

The evidentiary standard applicable to this case is the "preponderance of the evidence." This standard requires that the party asserting a fact show that "the existence of the fact is more probable than is its nonexistence."⁸ Genesis failed to provide any affirmative evidence in support of its Complaint. While Genesis filed Rebuttal Testimony, a review of that testimony shows that it also fails to provide any evidence in support of Genesis's claim. Genesis produced no competent information to support the allegations in its Complaint regarding the nature of the services it ordered from CenturyLink, what services actually were provided, the rates it was billed by CenturyLink or the amount that Genesis paid for the services rendered. To succeed on its claim Genesis must prove, not imply, these facts, all of which are necessary elements for Genesis to meet its affirmative burden of proof. Because Genesis produced no evidence to support its claim that it had overpaid CenturyLink for services, Genesis's Complaint is denied.

V. FINDINGS OF FACT

1. The definition of a DS1 loop in the parties' interconnection agreement is as follows:

"DS1 Loop" is a digital Local Loop having a total digital signal speed of 1.544 megabytes per second. DS1 Loops include, but are not limited to, two-wire and four-wire Copper Loops capable of providing high-bit rate digital subscriber line services, including T1 services.

(Agreement, Composite Hearing Exh. 1, Part A, Section 1.44).

⁸ 30 S.C. Jur. Evidence § 17.

2. The definition of DS1 loops mirrors the definition of DS1 loop in FCC Rule 47 C.F.R. 51.319(a)(4). (Tr. 29, 61).

3. The clear meaning of the term “byte” and its relationship to the term “bit” cannot be ascertained solely from the common usage of the term within the industry. (Tr. 48-49, 68).

4. Megabits per second is the industry standard measurement for DS1 speed. (Tr. 62, 134).

5. CenturyLink follows industry standards in its provisioning of DS1s and specifically its provisioning of DS1 loops to Genesis. (Tr. 134, 138).

6. It would not be technically feasible to provide DS1 loops at a speed of 1.544 Megabytes per second, if a byte is defined to contain 8 bits. (Tr. 62).

7. The use of the term “megabyte” in FCC Rule 51.319 likely was either a typographical error or was meant to be used interchangeably with the term “megabit.” (Tr. 79).

8. The DS1 speed that CenturyLink provides with its UNE DS1 loops is identical to the DS1 loop standard used ubiquitously in the national telecommunications network and by all other carriers, including AT&T and Verizon, for use in their own networks and for the DS1 UNEs they provide to other carriers. (Tr. 66-67).

9. The DS1 loops CenturyLink provides to Genesis are the same as the DS1 loops CenturyLink uses in its own network and provides to its subscribers and other carriers, in accordance with the FCC’s UNE rules. (Tr. 137).

10. Since December 2000 the parties negotiated three separate interconnection agreements containing identical language to the language in dispute here, the most recent in July 2008, without Genesis raising any discrepancy concerning the definition of DS1 loops and the UNE DS1 loops CenturyLink was providing. (Tr. 52-53).

11. During the first five-and-one-half years of the implementation of the parties' interconnection agreements, Genesis did not question the speed of the DS1 product being provided by CenturyLink. During this time period, Genesis ordered, used and paid for the DS1 loops without dispute. (Tr. 23).

12. For the period of July 16, 2008 through March 16, 2009, CenturyLink billed Genesis \$67.81 for each Band One DS1 loop and \$102.76 for each Band Three DS1 loop, while Genesis paid only \$29.40 for each of these loops. (Tr. 24-25).

13. For the period of April 15, 2009 through the present, CenturyLink has billed Genesis \$67.81 for each Band One DS1 loop and \$102.76 for each Band Three DS1 loop, while Genesis has paid only \$8.48 and \$12.85 for each of these Band One and Band Three loops, respectively. (Tr. 30).

14. Pending the resolution of this dispute, Genesis continues to pay the self-determined amount of \$8.48 and \$12.85 for each of the Band One and Band Three DS1 loops provided by CenturyLink, instead of the billed rates of \$67.81 and \$102.76, respectively. (Tr. 30).

15. As of January 12, 2010 (the date CenturyLink's Direct Testimony was filed), the amount Genesis short-paid CenturyLink was \$129,710.68. This amount has continued to grow since the time CenturyLink's Direct Testimony was filed. (Tr. 31).

16. The interconnection agreement provides for late charges to apply to disputed amounts when the dispute is determined not to be valid. (Agreement at Part B, Section 7.4).

VI. CONCLUSIONS OF LAW

As discussed above, the meaning of the term “megabyte” in the definition of DS1 loop in the context of the entire Agreement is unclear. Under South Carolina law, when a contract is ambiguous the Commission must then look to the evidence presented to determine the intent of the parties.⁹ The conclusions of law set forth below are based on the evidentiary record in this proceeding and the Findings of Fact listed above.

1. The parties intended DS1s to be provided in accordance with FCC rules and industry standards.

Both the FCC rules and orders and the Agreement itself rely on industry standards to determine the appropriate meaning of terms and the course of dealings between ILECs and CLECs.¹⁰ Relevant ANSI-approved standards define the parameters and speed of the DS1 element to be 1.544 Mbps (Megabits per second). The testimony shows that CenturyLink follows these standards in its provisioning of DS1s and specifically its provisioning of DS1 loops to Genesis (Tr. 65, 138) and that to do otherwise would not be technically feasible. (Tr. 62).

2. Genesis’s conduct is evidence of the parties’ intent.

During the first five-and-a-half years of the implementation of the parties’ interconnection agreements, Genesis did not question the speed of the DS1 product being

⁹ See, *Madden v. Bent Palm Investments*, 386 S.C. 459, 688 S.E.2d 597 (Ct. App. 2010).

¹⁰ TRO, ¶ 202 at footnote 634, *supra*; Agreement at part E, Section 45.8.7.

provided by CenturyLink. To the contrary, the evidence shows that during this time period Genesis continued to order, use and pay for the DS1 loops without dispute. (Tr. 23). The testimony shows that since December 2000, the parties negotiated three separate interconnection agreements containing the identical language to the language in dispute here, the most recent in July 2008, without Genesis raising any discrepancy concerning the definition of DS1 loops and the UNE DS1 loops CenturyLink was providing. (Tr. 52-53). Genesis's conduct is evidence that Genesis also viewed the intent of the Agreement to be the provision of DS1 loops in accordance with the 1.544 Megabits per second industry standard.

3. CenturyLink provides DS1 loops in accordance with industry standards and practice.

The testimony shows that the 1.544 Megabits per second speed that CenturyLink provides with its UNE DS1 loops is identical to the DS1 loop standard applied ubiquitously in the national telecommunications network and by all other carriers, including AT&T and Verizon, for use in their own networks and for the DS1 UNEs they provide to other carriers. (Tr. 66-67). Genesis did not present any testimony to the contrary, arguing only that the industry standard of 1.544 Megabits per second did not reflect the speed specified in the definition contained in the interconnection agreement. (Tr. 90, 93). The evidence also shows that the DS1 loops that CenturyLink provides to Genesis are the same as the DS1 loops CenturyLink uses in its own network and provides to its subscribers and other carriers, in accordance with the FCC's UNE rules. (Tr. 137).

Again, Genesis does not dispute or provide any evidence to refute CenturyLink's testimony in this regard.

4. CenturyLink properly billed Genesis for DS1 loops.

The evidence shows that Genesis ordered and CenturyLink provided DS1 loops in accordance with the Agreement. Part E, Section 40 of the Agreement states that the rates for unbundled network elements are those set forth in Table One. (Agreement, Composite Hearing Exh. 1). The evidence also shows that CenturyLink billed Genesis for DS1 loops at the rates set forth in the Agreement in Table One. (Tr. 25, 30; Agreement, Composite Hearing Exh. 1). Based on the evidence and the terms of the Agreement, CenturyLink properly billed Genesis for the UNE DS1 loops it provided and is due the full amount billed for these services from Genesis, pursuant to the Agreement.

IT IS THEREFORE ORDERED THAT:

1. Genesis's Motion for Summary Judgment and Motion in Limine are denied for the reasons set forth above;
2. Genesis's Complaint is denied and dismissed for failure to meet its burden of proof;
3. CenturyLink's Counterclaim is granted and Genesis is ordered to pay CenturyLink pursuant to the terms of the Agreement; and

AUGUST 12, 2010

PAGE 14

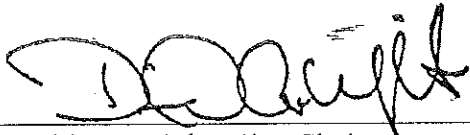
4. This Order shall remain in full force and effect until further order of the Commission.

BY ORDER OF THE COMMISSION:



John E. Howard, Chairman

ATTEST:



David A. Wright, Vice Chairman

(SEAL)